Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–517 OF 2010
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ANANTHAM KASINATHER JJCA
18 JANUARY 2013

Contract — Agreement — Settlement agreement — Settlement agreement for payment of works done under construction agreement — Developer purporting to repudiate settlement agreement on ground of fraud in concealment of defective earthworks — Courts to be slow to interfere with settlement agreements — End to litigation — Parties to held to their bargains — No evidence of fraud

Contract — Building contract — Payment — Refusal of developer to pay subcontractor on grounds of defective earthworks — Completed works approved by developer — Developer entering into settlement agreement to pay for works — Whether developer estopped from alleging defective works

Contract — Fraud — Proof of — Attempt to rescind settlement agreement on grounds of fraud — Failure to prove fraud beyond reasonable doubt — Whether mere illusion of fraud sufficient — Whether proven

Contract — Novation — Effect of — Building contract — First respondent nominated subcontractor of second respondent — Initial contract awarded by appellant to second respondent novated to first respondent — Whether separate contract existing between the appellant and the first respondent — Whether second respondent discharged from obligation under original appointment — Contracts Act 1950 s 63

The appellant was the developer of a housing project in which the first respondent was appointed as the main earthworks contractor. The first respondent was the second respondent's nominated subcontractor. The appellant alleged that there was an embankment failure in Phase 3B. Two years after the alleged embankment failure, the first respondent's solicitors issued a notice pursuant to s 218(1)(e) of the Companies Act 1965 for the sums due and owing by the appellant to the first respondent for the works carried out in the project. The appellant agreed to pay the sum of RM11,498,788.12 as

settlement of the first respondent's claim. Pursuant to the settlement agreement dated 5 February 2002, the appellant paid the first instalment amounting to RM2,500,000. However, just one day before the second instalment was due; the appellant purported to repudiate the settlement agreement on the ground of fraud. The appellant then commenced this action against the respondents contending that the appellant would not have entered into the settlement agreement but for the alleged fraud and conspiracy of the respondents in the alleged concealment of the defective earthworks. The appellant's claimed for rescission of the settlement agreement on the grounds of conspiracy, fraud and for breach of contract. The High Court dismissed the claim and allowed the first respondent's counterclaim under the settlement agreement. The appellant appealed against that decision.

Held, dismissing the appeal with costs:

(1) There was a compromise between the appellant and the first respondent by way of a settlement agreement and that ended the suit between the parties. Public policy demands that there should be an end to litigation and the parties should be held to their bargains (see para 23).

(2) There was no evidence of fraud perpetrated by the first respondent that entitled the appellant to rescind the settlement agreement. The embankment failure occurred two years before the settlement agreement was agreed upon by the appellant and the first respondent. The expert reports provided by the appellant were fraught with fanciful speculation and were insufficiently substantiated (see paras 29 & 39).

(3) The courts must be slow and cautious in deciding whether to interfere with settlement agreements entered by the parties (see para 40).

(4) The appellant's claim was cleverly designed to merely raise the spectre of fraud in order to avoid its obligations under the settlement agreement. An illusion of fraud cannot fulfill the standard of proof as required by the law. The appellant failed to prove fraud beyond reasonable doubt (see para 41).

(5) The contract that was initially awarded to the second respondent as the main contractor had been novated. And there existed a new, separate and binding contract between the appellant and the first respondent to the exclusion of the second respondent. By virtue of s 63 of the Contracts Act 1950, the second respondent had been discharged from any contractual obligation under the original appointment (see paras 44 & 46).

(6) All the facts coupled with the settlement agreement and the subsequent payment of the first instalment could only lead to only one conclusion: that the appellant must be estopped from claiming that there were defective works under the original agreement (see para 57).

(7) The first respondent had carried out its works under the contracts. The works were accepted by the appellant through two methods: testing and certification process. The appellant even issued its final certificate for payment and the certificate of making good defects. But the first respondent was not paid the balance sums due to it under the certificates (see para 58).

(8) The allegations of fraud and conspiracy were based on the facts known to the appellant prior to entering the settlement agreement. It could not be denied that the first respondent had carried out substantial works for the benefit of the appellant and the first respondent had been kept out of the funds since 2002. The appellant had benefitted and enjoyed the fruits of the first respondent's labour (see para 59).

[Bahasa Malaysia summary

Perayu merupakan pemaju projek perumahan yang mana responden pertama dilantik sebagai kontraktor kerja tanah utama. Responden pertama merupakan sub-kontraktor yang dicalonkan oleh responden kedua. Perayu mendakwa bahawa terdapat satu kegagalan pembentengan di Fasa 3B. Dua tahun selepas kegagalan pembentengan yang didakwa, peguamcara responden pertama mengeluarkan satu notis menurut s 218(1)(e) Akta Syarikat 1965 untuk jumlah yang perlu dibayar dan terhutang oleh perayu kepada responden pertama untuk kerja-kerja yang dijalankan di dalam projek tersebut. Perayu bersetuju membayar sejumlah RM11,498,788.12 sebagai penyelesaian tuntutan responden pertama. Menurut perjanjian penyelesaian bertarikh 5 Februari 2002, perayu membayar ansuran pertama berjumlah RM2,500,000.00. Walau bagaimanapun, hanya sehari sebelum ansuran kedua perlu dibayar; perayu berniat untuk menolak perjanjian penyelesaian atas alasan penipuan. Perayu kemudiannya memulakan tindakan ini terhadap responden-responden dengan menghujah bahawa perayu tidak akan memeterai perjanjian penyelesaian sekiranya bukan disebabkan dakwaan penipuan dan konspirasi responden dalam menutup kerja-kerja tanah yang cacat. Perayu menuntut untuk pembatalan perjanjian penyelesaian atas alasan konspirasi, penipuan dan untuk pelanggaran kontrak. Mahkamah Tinggi menolak tuntutan tersebut dan membenarkan tuntutan balas responden pertama di bawah perjanjian penyelesaian. Perayu merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Terdapat kompromi antara perayu dan responden pertama melalui perjanjian penyelesaian dan perjanjian tersebut mengakhiri guaman antara pihak-pihak. Polisi awam menuntut bahawa tindakan undang-undang perlu dihentikan dan pihak-pihak perlu melaksanakan seperti yang dipersetujui (lihat perenggan 23).

(2) Tiada keterangan penipuan yang dilakukan oleh responden pertama yang memberikan hak kepada perayu untuk menarik balik perjanjian penyelesaian. Kegagalan pembentengan berlaku dua tahun sebelum perjanjian penyelesaian dipersetujui oleh perayu dan responden pertama. Laporan pakar yang dikemukakan oleh perayu penuh dengan spekulasi khayalan dan tidak cukup berasas (lihat perenggan 29 & 39).

(3) Mahkamah perlu berhati-hati dan berjaga-jaga dalam memutuskan sama ada untuk campur tangan dengan perjanjian penyelesaian yang dimeterai oleh pihak-pihak (lihat perenggan 40).

(4) Dakwaan perayu direka dengan bijak hanya untuk menimbulkan bayangan penipuan bagi mengelakkan kewajipannya di bawah perjanjian penyelesaian. Ilusi penipuan tidak dapat memenuhi standard bukti yang diperlukan di sisi undang-undang. Perayu gagal untuk membuktikan penipuan melangkaui keraguan munasabah (lihat perenggan 41).

(5) Kontrak yang pada mulanya diawardkan kepada responden kedua sebagai kontraktor utama telah diserahkan haknya. Dan terdapat satu kontrak baru, berasingan dan mengikat di antara perayu dan responden pertama yang mengecualikan responden kedua. Menurut s 63 Akta Kontrak 1950, responden kedua telah dilepaskan daripada sebarang kewajipan kontrak di bawah perlantikan asal (lihat perenggan 44 & 46).

(6) Kesemua fakta ditambah dengan perjanjian penyelesaian dan pembayaran selepas ansuran pertama hanya membawa boleh kepada satu kesimpulan: bahawa perayu perlu diestop daripada mendakwa bahawa terdapat kecacatan kerja-kerja di bawah perjanjian asal (lihat perenggan 57).

(7) Responden pertama telah menjalankan kerja-kerjanya di bawah kontrak. Kerja-kerja tersebut diterima oleh perayu melalui dua kaedah: proses pengujian dan pensijilan. Malah, perayu telah mengeluarkan sijil akhir untuk bayaran dan sijil membaiki kecacatan. Tetapi responden pertama tidak dibayar baki jumlah terhutang kepadanya di bawah sijil-sijil tersebut (lihat perenggan 58).

(8) Dakwaan penipuan dan konspirasi adalah berdasarkan fakta-fakta diketahui oleh perayu sebelum memeterai perjanjian penyelesaian. Tidak boleh dinafikan bahawa responden pertama telah menjalankan kerja-kerja utama untuk kepentingan perayu dan responden pertama telah dinafikan dana tersebut sejak tahun 2002. Perayu telah mendapat manfaat dan menikmati hasil daripada kerja responden pertama (lihat perenggan 59).]

Notes

For cases on effect of novation, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5697–5699.

For cases on payment, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3645–3648.

For cases on settlement agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2995–2997.

Cases referred to

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45, FC (refd)

Charles Rickards LD v Oppenhaim [1950] 1 KB 616, CA (refd)

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1986] 1 MLJ 105, PC (refd)

Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd [1990] 1 MLJ 21, HC (refd)

Davie v Magistrates of Edinburgh 1953 SC 34 (refd)

Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd [1996] MLJU 359; [1997] 1 CLJ Supp 448, HC (refd)

Kamal Kant Paliwal v Smt Prakash Devi Paliwal and others AIR 1976 Raj 79, HC (refd)

Knowles v Roberts (1888) 38 Ch D 263, CA (refd)

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)

Low v Bouverie [1891] 3 Ch 82, CA (refd)

Lyl Hooker Sdn Bhd v Tevanaigam Savisthri & Anor [1987] 2 MLJ 52, SC (refd)

M and R (minors) (sexual abuse: expert evidence), Re [1996] 4 All ER 239, CA (refd)

M/s RC Thakkar v (The Bombay Housing Board by its successors) now The Gujarat Housing Board AIR 1973 Guj 34 (refd)

MBf Finance Bhd v Sri-Hartamas Dvpt Sdn Bhd [1992] 1 CLJ 160, HC (refd)

Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53, PC (refd)

Malaysian International Merchant Bankers Bhd v Datuk Mohd Salleh & Anor [1988] 1 CLJ (Rep) 786, HC (refd)

Mawar Awal (M) Sdn Bhd v Kepong Management Sdn Bhd & Anor [2005] 6 MLJ 132, HC (refd)

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (refd)

PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd [1995] 1 MLJ 21, HC (refd)

Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd [1998] 3 MLJ 810, HC (refd)

Plumley v Horrell (1869) 20 LT 473 (refd)

Sunshine Securities (Pte) Ltd, Re; Sunshine Securities (Pte) Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd [1978] 1 MLJ 57, CA (refd)

W J Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 All ER 127, CA (refd)

Wei Giap Construction Co (Pte) Ltd v Intraco Ltd [1979] 2 MLJ 4 (refd)
William Derry, JC Wakefield, MM Moore, J Pethick and SJ Wilde v Sir Henry William Peek, Baronet (1889) 14 App Cas 337, HL (refd)

Legislation referred to

Companies Act 1965 s 218(1)(e), (2)
Contracts Act 1950 ss 17, 17(d), (e), 19, 63
Evidence Act 1950
Specific Relief Act 1950 ss 30, 34(1)(a)

Appeal from: Civil Suit No S2–22–241 of 2002 (High Court, Kuala Lumpur)

Robert Low (Tan Chong Lii with him) (Ranjit Ooi & Robert Low) for the appellant.
C Sri Kumar (Chetan Jethwani with him) (Kumar Partnership) for the first respondent.
Faizal Hassan bin Abdul Hamid (Edlin Ghazali & Associates) for the second respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal against the decision of the High Court in dismissing the appellant's claim and entering judgment on the first respondent's counterclaim after a full trial.

[2] The appellant's claim before the High Court was for the rescission of a settlement agreement on the grounds of conspiracy, fraud and for breach of contract.

[3] The first respondent's counterclaim centred on the settlement agreement where the appellant agreed to pay the first respondent the sum of RM11,498,788.12. After the appellant had made the first payment of RM2,500,000, the appellant defaulted in making the subsequent instalment and pursuant to the settlement agreement, the appellant was liable to pay the first respondent the remaining balance sum of RM8,998,788.12.

THE RELEVANT FACTS

[4] This is a factually based appeal and we will now narrate the events that follow. The appellant is the developer of a housing project in Bukit Cerakah, Shah Alam. The first respondent, on the other hand, is an earthworks contractor.

[5] Now, the first respondent was appointed as the main earthworks contractor for the development in Phase 3A and Phase 3B.

[6] In regard to Phase 3B, the first respondent was the second respondent's nominated subcontractor. The appellant agreed to make all payments that were due under the Phase 3B contract directly to the first respondent. Evidence wise, there is no direct contractual relationship between the appellant and the first respondent in respect of the works that were carried out in Phase 3B. The letter dated 1 April 1999 from the appellant to the second respondent appointing the first respondent as the nominated subcontractor can be seen at the first respondent's core bundle at Tab 1. That letter was worded as follows:

> Nomination of subcontractor for PROPOSED CONSTRUCTION AND COMPLETION OF EARTHWORKS AND MAIN DRAINAGE WORKS FOR CADANGAN PEMBANGUNAN BERSEPADU PUNCAK ALAM Dl ATAS LOT PT. 1929 AND PT. 1935, LADANG FELDA BUKIT CHERAKAH, MUKIM JERAM DAN IJOK, DAERAH KUALA SELANGOR, SELANGOR DARUL EHSAN (PHASE 3B)
>
> - Instruction to Appoint Nominated subcontractors
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> ---
>
> In accordance with Clause 28 of the Conditions of Contract, you are hereby instructed to accept the Tender for the above-mentioned subcontract Works from Menta Construction Sdn Bhd, who has been nominated to execute and complete the said subcontract Road and Drainage Works for the total sum of Ringgit Malaysia: Eleven Million Six Hundred Seventy Seven Thousand Eight Hundred and Ten (RM11,677,810.00).
>
> The above-mentioned firm shall become Nominated subcontractor and you shall be required to enter into a formal subcontract with the said firm.
>
> The subcontract documents will be prepared and you shall be notified when they are ready to be signed by you and the Nominated subcontractor.
>
> The Nominated subcontractor has undertaken to commence the subcontract Works within two (2) weeks from the date of receipt of your Official Order and to complete the whole of the subcontract Works within Twelve (12) Months from the date of Site Possession.
>
> All correspondence i.e. letters, instructions and the like issued by the Superintending Officer whether directly or indirectly to you relating to subcontract Works shall be deemed to have been served to you and taken effect thereof by the Nominated subcontractor in so far as it related to the proper execution and completion of the NSC works.
>
> You are hereby required to provide all necessary Supervision and Administration of the Nominated subcontractor's Works including co-ordination with the Employer and the S.O. to ensure the timely completion of the Works and compliance with the provisions of the Contract.

Please prepare the necessary Letter of Acceptance and Documents for the execution of both the contracts.

[7] Another significant letter from the appellant to the first respondent dated 1 April 1999 agreeing to make payment to the first respondent as reflected at the first respondent's core bundle at Tab 2 was worded in this way:

PROPOSED CONSTRUCTION AND COMPLETION OF EARTHWORKS AND MAIN DRAINAGE WORKS FOR CADANGAN PEMBANGUNAN BERSEPADU PUNCAK ALAM Dl ATAS LOT PT. 1929 AND PT. 1935, LADANG FELDA BUKIT CHERAKAH, MUKIM JERAM DAN IJOK, DAERAH KUALA SELANGOR, SELANGOR DARUL EHSAN (PHASE 3B)

- Direct Payment To Nominated subcontractors

With reference to the above, we hereby confirmed and agreeable to make all interim payments direct to MENTA CONSTRUCTION SDN BHD as the Nominated subcontractor of the above-referred works of all amounts which have been certified by the Superintending Officer.

[8] It is appropriate to mention that the contractual commencement date for Phase 3A was on 9 November 1998 and for Phase 3B was on 1 April 1999. In this connection, it is ideal to refer to the first respondent's core bundle at Tab 3 exhibiting the letter of acceptance for Phase 3A showing the commencement date to be on 9 November 1998 and that would be the date of site possession. This would be followed by the letter of acceptance showing the commencement date to be on 1 April 1999 as the date of site possession as seen at the first respondent's core bundle at Tab 4.

[9] The certificate of practical completion for Phase 3A showed that the first respondent completed the works for Phase 3A on 15 January 2000 and the defects liability period for Phase 3A was set to end on 15 January 2001.

[10] While the certificate of practical completion for Phase 3B showed that the first respondent completed the works for Phase 3B on 31 March 2000 and the defects liability period for Phase 3B was set to end on 31 March 2001.

[11] Sometime in the year 2000, the appellant alleged that there was an embankment failure in Phase 3B.

[12] The certificate of final account addressed to the first respondent for Phase 3A showed the sum of RM22,753,755.25 as the amount due to the contractor as seen in the first respondent's core bundle at Tab 7. While the certificate of final account issued for Phase 3B and addressed to the first

respondent showed the sum of RM13,003,282.42 as the amount due to the contractor as reflected in the first respondent's core bundle at Tab 8.

[13] And the certificate of making good defects were also issued for both Phase 3A and Phase 3B upon conclusion of the defects liability period.

[14] On 17 January 2002, two years after the alleged embankment failure, the first respondent's solicitors issued a notice pursuant to s 218(1)(e) of the Companies Act 1965 for the sum of RM10,498,788.12 plus interest of RM1,321,245.91 being sums due and owing by the appellant to the first respondent for the works carried out in Phase 3A and Phase 3B. The inability of the company to pay its debts is very common and it is often used as a ground to obtain a winding up order. And the inability to pay is usually proved by service of a statutory notice under s 218(2) of the Companies Act 1965 or by other proof of insolvency. The law books are replete with authorities on this point. Any creditor who has not been paid has the right to file a petition for winding up whatever his other motives may be (*Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95, (SC)). And the test of commercial insolvency is quite simple: the inability of the company to meet its current debts as they fall due. However, such a company may have substantial wealth which cannot be immediately realised, yet the company is still 'unable to pay its debts' as they fall due *(Re Sunshine Securities (Pte) Ltd;Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57 (CA); *Wei Giap Construction Co (Pte) Ltd v Intraco Ltd* [1979] 2 MLJ 4; *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 (PC); *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21; *MBf Finance Bhd v Sri-Hartamas Dvpt Sdn Bhd* [1992] 1 CLJ 160 at p 169; *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 at p 454 (SC); *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21 at p 29; and *Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd* [1998] 3 MLJ 810 at p 814).

[15] Now, as a result of the 218 notice, the appellant and the first respondent entered into negotiations wherein the appellant agreed to pay the sum of RM11,498,788.12 as settlement of the first respondent's claim. It is this settlement agreement dated 5 February 2002 that formed the backbone of the present appeal to us.

[16] Pursuant to the settlement agreement, the appellant made payment of the first instalment amounting of RM2,500,000.

[17] By letter dated 7 March 2002 as seen in the first respondent's core bundle at Tab 15, just one day before the second instalment was due, the

appellant purported to repudiate the settlement agreement on the ground of fraud. The third paragraph of the letter dated 7 March 2002 was worded as follows:

> We have just uncovered the fact that the interim certificates and the Statement of Final Accounts which form the basis of the purported debt to you was procured fraudulently. The said certificates were based on inter alia, density tests indicating the compaction percentage of earthworks carried out by you. In fact, the density test results were false and misleading as the purported compaction percentage indicated in the said test results were designed to meet the minimum requirement provided for in the Contracts, when in fact, they fell far below such minimum requirement. Relying on the said density test results, the S.O. issued the interim certificates and the Statement of Final Accounts.

[18] On 8 March 2002, the appellant then commenced this action against the first and second respondents as well as the third defendant in the High Court.

ANALYSIS

[19] The main plank of the appellant's claim before the High Court was that the appellant would not have entered into the settlement agreement but for the alleged fraud and conspiracy of the first and second respondents. The alleged conspiracy concerned the alleged concealment of the defective earthworks.

[20] The High Court made the following findings of fact:

(a) that the alleged embankment failure alerted the appellant to the defective works that occurred in 2000, two years prior to entering the settlement agreement dated 5 February 2002;

(b) that in November 2001, the appellant secured the services of a company known as Soil Instruments (M) Sdn Bhd to investigate and prepare a soil investigation report and the results would only be made available by the end of November;

(c) and notwithstanding the foregoing, the appellant nevertheless entered into the settlement agreement with the first respondent; and

(d) to compound the matter further, the appellant made the first instalment payment to the first respondent under the settlement agreement.

[21] The High Court further held that the expert report of Soil Instruments (M) Sdn Bhd was only confined to the area where the embankment failure took place and it was insufficient, standing on its own, to conclude that defective works occurred over the entire project area. The High Court also held that there was absolutely no evidence of fraud but only suspicion that shrouded the

evidence of the appellant's own expert. It is germane, at this juncture, to reproduce the relevant passages in the judgment of the High Court as seen at pp 31–33 of the appeal record at *Jilid* 1/47 of *Bahagian* 'A':

> 17. In this case, the ground is that the compromise ought to be set aside because it was obtained by fraud. The particulars of fraud relied upon were set out. The plaintiff portrayed itself as the victim of a fraud who would not have entered into the compromise if it had known the facts. The plaintiff's argument is not without its problems. The plaintiff was aware of the slope failure in year 2000. It had occurred in 1999. The plaintiff had engaged Soil Instruments (M) Sdn Bhd to undertake a soil investigation in November 2001, the results of which were available in a report to the plaintiff at the end of November. The plaintiff proposed settlement, and a settlement was agreed to on 5/2/2002. The first payment under the settlement was paid the next day. Only the day before the second payment due on 8/3/2002, a month later, did the plaintiff refuse payment and proceeded to purport to rescind the settlement agreement, alleging the use of unsuitable materials and fraud.
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> 18. As to fraud, it is trite law that fraud requires a standard of proof higher than a balance of probabilities. There is not much in the way of evidence of actual wrongdoing, except they appeared to have worked on the same site and the result was the embankment failure. I confine the description to 'embankment failure' for that is the only area where failure was a certainty. The consultant's report upon which the plaintiff's actions was founded, and specifically pleaded in this case and quoted above, contains limitations. Engineers are cautious persons and it is always necessary to read equally carefully their carefully chosen words.
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> 19. Firstly, the statement 'Taking this embankment failure area as representative of the total development area …' shows the consulting engineer applied his findings from the embankment failure area to the rest of the area for which, one might recall, there was no failure. Secondly, the words '… with the observed surface conditions throughout the site …' means that in respect of the other areas where there was no failure, he relied upon the observed surface conditions only. The consulting engineer concluded '… there is strong evidence suggesting that misrepresentation of the actual soil density value and compaction quality is prevalent throughout the entire development area'. He would only go so far as to use the words 'suggesting' and 'misrepresentation' but did not say the strong evidence 'showed' or 'proved' or that the misrepresentation of the actual soil density value and compaction quality were such they breached the contract specifications. The reason for caution in the language is for the obvious reason his review was conducted a considerable time after the performance of the contract and the embankment failure.
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> 20. I would conclude that the report of the consulting engineer is not unequivocal and the evidence to support the plaintiff's claim as to unsuitable materials is therefore inconclusive, and as to fraud it is non-existent. There is precious little, other than suspicion, to justify

drawing an inference or conclusion of fraud or unsuitable materials in respect of the site areas other than in respect of the embankment failure area.

21. As to the embankment failure area, it would be prima facie inconceivable that the settlement arrived at on 5/2/2002 failed to take (into) account the conditions found of the embankment failure area since the failure occurred in 1999.

[22] Since the appellant had failed to prove conspiracy and fraud, the High Court rightly dismissed the appellant's claim and allowed the first respondent's counterclaim to enforce the settlement agreement.

[23] There was a compromise between the appellant and the first respondent by way of a settlement agreement and that ended the suit between the parties. Public policy demands that there should be an end to litigation and the parties should be held to their bargains. Lord Romilly MR in *Plumley v Horrell* (1869) 20 LT 473, aptly said:

> The Master of the Rolls said that when an agreement was entered into for a compromise, one would suppose, prima facie, that the case was not to be tried over again.

[24] Here, the compromise by way of a settlement emanated from the appellant who had the blessings of their board of directors and this was transmitted by way of a letter from the appellant dated 30 January 2002 addressed to the first respondent's solicitors as seen at Tab 12 of the first respondent's core bundle. In that letter, the appellant stated as follows:

> We sincerely hope that the above said proposed Schedule of Payment is acceptable to your client. The above said proposal is the best we could offer for amicable solution as we are currently facing a cash flow problem. We trust you could convey our proposal for amicable settlement to your client and revert to us in due course for us to prepare the first payment as hereinbefore mentioned.

[25] And the proposal for settlement was accepted by the first respondent through its solicitor's letter dated 5 February 2002 addressed to the appellant as seen at Tab 13 of the first respondent's core bundle. It is this letter dated 5 February 2002 that gave rise to a complete settlement agreement between the appellant and the first respondent. Put in another way, the letter dated 5 February 2002 crystallised the settlement agreement between the parties. And that ended the dispute between the parties. In the words of Bowen LJ in *Knowles v Roberts* (1888) 38 Ch D 263, at p 272:

> As soon as you have ended a dispute by a compromise you have disposed of it.

[26] It was argued on behalf of the appellant that the compromise should be set aside because of fraud. Section 17 of the Contracts Act 1950 lays down five different acts which may constitute fraud and for convenience that section is now reproduced verbatim:

> 17 'Fraud'.
>
> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
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> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
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> (b) the active concealment of a fact by one having knowledge of belief of the fact;
>
> (c) a promise made without any intention of performing it;
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> (d) any other act fitted to deceive; and
>
> (e) any such act or omission as the law specially declares to be fraudulent.

[27] The House of Lords in *William Derry, JC Wakefield, MM Moore, J Pethick and SJ Wilde v Sir Henry William Peek, Baronet* (1889) 14 App Cas 337 (HL) defined 'fraud' as a false representation 'made (i) knowingly or (ii) without belief in its truth or (iii) recklessly, without caring whether it be true or false'. However, our s 17 of the Contracts Act 1950 defines fraud on a wider scope as compared to the common law meaning of 'fraud' as stipulated by *William Derry, JC Wakefield, MM Moore, J Pethick and SJ Wilde v Sir Henry William Peek, Baronet*. Paragraphs (d)–(e) of s 17 of the Contracts Act 1950 stipulates that any act 'fitted to deceive' another or 'any such act or omission which the law specially declares to be fraudulent' may also constitute fraud under the said Act. Reference should also be made to such cases like *M/s RC Thakkar v (The Bombay Housing Board by its successors) now The Gujarat Housing Board* AIR 1973 Guj 34; and *Kamal Kant Paliwal v Smt Prakash Devi Paliwal and others* AIR 1976 Raj 79.

[28] According to s 19 of the Contracts Act 1950, a contract that is induced by fraud is voidable and not void. At this juncture, it is also ideal to refer to s 30 of the Specific Relief Act 1950 ('Act 137') which deals with rectification of a contract tainted by fraud and where fraud is proved then the court may in its discretion rectify the said contract. Equally important is s 34(1)(a) of the Specific Relief Act 1950 (Act 137) which allows an aggrieved party to apply to the court to have the contract rescinded.

[29] In our judgment, there was no evidence of fraud perpetrated by the first respondent that entitled the appellant to rescind the settlement agreement dated 5 February 2002. We are in full accord with the decision of the High

Court that the embankment failure occurred two years before the settlement agreement was agreed upon by the appellant and the first respondent.

[30] It is trite law that a high standard of proof is required where fraud is alleged. Lord Keith of Kinkel, delivering the judgment of the Privy Council, in *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105, at p 110, aptly said:

> … that the standard of proof of fraud in civil proceedings was the criminal standard of proof beyond reasonable doubt.

[31] In the same vein, Mohd Azmi FCJ writing for the Federal Court in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45, at p 61, succinctly said:

> The definition of 'fraud', read in conjunction with the authorities, leads us to the conclusion that where the fraud alleged in civil proceedings is based on a criminal offence, the criminal burden of proof beyond reasonable doubt must be applied. But where the fraud alleged is purely civil in nature, there is no reason why the civil burden should not apply.

[32] Now, before the High Court, the appellant alleged that the first respondent and the third defendant had conspired to defraud the appellant by issuing false and misleading soil density tests. And the appellant claimed that its consent to the settlement agreement was vitiated by the fraud of the first respondent and the third defendant acting in conspiracy. In order to appreciate the appellant's submissions, it would be ideal to examine the evidence that was led before the High Court and the following evidence was disclosed:

(a) that the soil density testing was supervised, controlled and monitored by the appellant's own supervising officer by the name of Encik Sihat bin Md Salleh ('DW5') as well as by the third defendant. In his witness statement by way of an affidavit, DW5 testified as follows:

> 3.Q: Apakah skop tugas En. Sihat berkenaan dengan projek kerja-kerja tanah atas Fasa 3A dan 3B projek pembangunan plaintif di Bukit Cerakah?
>
> A: Skop tugas saya sebagai Senior Clerk (of) Works adalah menjalankan pengawasan ke atas kontraktor kerja-kerja tanah sebagaimana yang terdapat di dalam kontrak dokumen dan adalah mengikut arahan Superintending Officer.
>
> 4.Q: Apakah tugas En. Sihat berkenaan ujian pemampatan tanah di atas tapak Fasa 3A dan 3B?
>
> A: Tugas saya adalah untuk menyelia ujian pemampatan tanah dari

masa ke semasa samada ia dijalan di situ atau yang dijalankan oleh pakar kaji tanah yang dilantik oleh kontraktor.

5.Q: Siapa yang mengarahkan pembuatan kajian pemampatan tanah?

A: Setelah berunding dengan jurutera perunding, saya atau En. Salim bin Abdullah akan memaklumkan kontraktor untuk menjalankan ujian pemampatan tersebut.

6.Q: Siapa akan memilih tapak dan masa ujian?

A: Saya atau rakan sekerja saya, En. Salim bin Abdullah akan memilih tapak ujian dan masa ujian tersebut akan dilangsungkan.

7.Q: Apakah prosedur penyeliaan ujian tersebut?

A: Apabila didapati lapisan-lapisan penambakan telah siap bagi satu-satu kawasan, ujian pemampatan akan dijalankan, di mana defendan pertama akan menjalankan ujian In Situ Field Density Test atau ujian akan dijalankan oleh pihak perunding kaji tanah yang dilantik oleh kontraktor. Sebagai penyeliaan saya atau rakan sekerja saya, En. Salim bin Abdullah akan menyaksikan pengambilan sampel di tapak tersebut. Bagi ujian in situ, samada saya atau En. Salim akan menyaksikan ujian yang dijalankan. Bagi ujian oleh defendan ketiga, ujian akan dijalankan di makmal mereka sendiri. Selepas ujian in situ dijalankan, laporan ujian tersebut akan ditandatangani oleh pihak menyaksikannya. Jika saya tidak menyaksikannya, saya akan mendapat pengesahan daripada En. Salim dan menandatangani laporan ujian tersebut.

8.Q: Sila rujuk Ikatan Dokumen Bersama Jilid VI. Apakah dokumen-dokumen yang terkandung di dalam itu?

A: Dari mukasurat 1840 sampai mukasurat 1898 adalah laporan ujian in situ yang dijalankan atas tapak Fasa 3A tersebut. Dari mukasurat 1899 sampai 2019 adalah laporan ujian yang dijalankan oleh defendan ketiga.

9.Q: Apakah akan berlaku jika ujian tersebut tidak menepati spesifikasi yang ditetapkan?

A: Jika laporan ujian tersebut tidak menepati spesifikasi, defendan pertama akan diarahkan untuk membuat kerja pemampatan semula dan menguji balik.

10.Q: Adakah En Sihat ingat kejadian kegagalan slope di embankment di Fasa 3B?

A: Ya ada ingat. Memang terdapat kegagalan slope di luar sempadan kawasan 3B.

11.Q: Adakah En Sihat tahu samada punca kegagalan tersebut?

A: Saya rasa kegagalan tersebut diakibatkan kerana perjalanan air yang

terganggu atau tidak menentu. Adalah kemungkinan bahawa ia berpunca daripada pembuangan tanah dan sampah di atas kawasan tersebut yang tidak terkawal.

12.Q: Kenapa En Sihat berpendapat begitu?

A: Kerana apabila siap kerja-kerja tanah di kawasan tersebut, kawasan tersebut telah diserahkan balik kepada plaintif dan keadaan masa itu nampak rata dan bersih. Tetapi hanya selepas pembuangan itu ke atas kawasan tersebut baru terdapat kegagalan slope. Perkara ini boleh ditunjukkan dalam As Built Level Drawing yang diambil oleh jurukur berlesen yang dilantik oleh defendan pertama sebelum penyerahan kepada plaintif. As Built Level Drawing tersebut akan menunjukkan level-level dan slope semasa penyerahan kepada plaintif dan jurutera perunding.

13.Q: Adakah pihak defendan pertama dibenarkan untuk menggunakan pokok kelapa sawit untuk dijadikan bahan tambahan tanah atau fill material?

A: Defendan pertama dibenarkan untuk menggunakan pokok kelapa sawit sebagai fill material di bawah tetapi di bawah kawasan lapang sahaja.

14.Q: Macam mana pula dengan bahan ketulan batu atau 'boulder'?

A: la dibenarkan jika diameter kurang daripada 610 mm dan tidak boleh berkelompok tetapi bukan di kawasan platform bangunan.

15.Q: Setakat pengetahuan En. Sihat adakah kerja-kerja yang dijalankan oleh defendan pertama mengikut keperluan plaintif mengikut kontrak?

A: Ya. Pada masa itu saya berpendapat bahawa kerja-kerja tersebut dijalan mengikut terma-terma.

16.Q: Adakah En. Sihat berpendapat bahawa defendan pertama atau defendan ketiga telah memperdayakan En. Sihat berkenaan dengan ujian-ujian pemampatan atau bahan-bahan yang digunakan untuk menambak tanah tersebut?

A: Tidak.

(b) under cross-examination, DW5 testified as follows (see p 577 of the appellant's core bundle, Vol 2 of 2):

S: Adakah En. Sihat ni ada hak untuk menukar apa-apa spesifikasi di dalam Kontrak di antara plaintif dengan 1st defendant?

J: Saya tak berhak bertukar melainkan mendapat kebenaran daripada SO, Wan Husin. Wan Husin representative masa itu.

S: En. Sihat ni telah mendapatkan arahan dari En. Wan Husin untuk

membenarkan 1st defendant membuang pokok-pokok kelapa sawit yang dipotong secara kecil ke dalam fill, tempat fill di kawasan lapang, ya?

J: Ya, betul.

S: Adakah En. Sihat ni tahu bahawa arahan Wan Husin itu adalah untuk membuang pokok kelapa sawit ini secara layer yang ada tanah compact di atas layer/lapis mampat, tanah lapis mampat di atas setiap layer pokok kelapa sawit itu?

J: Ya, memang ada - memang betul.

S: Tahu ya?

J: Ya, tahu.

S: Adakah En. Sihat ni melihat semasa 1st defendant membuang pokok kelapa sawit ni ke dalam tanah tempat-tempat yang dibenarkan?

J: Biasa lihat.

(c) again, under cross-examination, DW5 testified at p 583 of the appellant's core bundle, Vol 2 of 2 as follows:

S: Boleh kita pergi ke E4 mukasurat 17. Adakah En. Sihat yang menulis surat in?

J: Ya, saya yang menulis surat ini.

S: Adakah surat ini mengatakan terdapat boulder-boulder yang besar yang diletak di dalam filling di Parcel D, E dan F?

J: Benarkan saya baca balik, ya?

S: Ya.

J: Ulang balik soalannya?

S: Adakah surat ini mengatakan bahawa 1st Defendant meletakkan boulder-boulder yang besar di dalam fill mereka di Parcel D, E danF?

J: Betul.

(d) continuing on the same page and spilling over to p 584 of the appellant's core bundle, Vol 2 of 2, DW5 had this to say:

S: Dan adakah surat ini juga mengatakan bahawa fill ini sedang dibuat secara layer sebanyak 2 kaki?

J: Ya, betul.

S: 2 kaki ini memang lebih lebar daripada 225 mm?

J: Ya, betul.

(e) under re-examination, DW5 testified as follows (see pp 599–600 of the appellant's core bundle, Vol 2 of 2):

S: En. Sihat, merujuk kepada Soalan mukasurat 17, ya, Ikatan E4 tadi and merujuk kepada Kenyataan En. Sihat tadi bahawa terdapatnya satu Trial Compaction Test yang membenarkan lapisan yang lebih daripada 2 kaki. Adakah kejadian itu selepas pengeluaran surat ini? Boleh En. Sihat ingat ke tak? Ini dalam tahun 1999 Oktober, jadi mungkin masih awal lagi.

J: Saya masa itu kita buat dekat 3A.

S: 3A?

J: Ya.

S: Dan ini bagi pihak, bagi Fasa?

J: lni 3B.

(f) from pp 600–601 of the appellant's core bundle, Vol 2 of 2, DW5 said under re-examination:

S: Jadi arahan yang berkenaan dengan isu lapisan 2 kaki, adakah ini dipersetujui oleh SO?

J: Itu saya tak ingat lagi.

S : Tak ingat?

J: Tak ingat lagi.

S: Tapi ada perbincangan?

J: Ada perbincangan dan ada buat dekat site tapi saya tak ingat keputusan macam mana.

S: Tak ingat keputusan.

J: Tapi, ya, tak ingat.

S: En. Sihat juga telah menyatakan bahawa apabila melihat slope failure itu dia berpunca daripada erosion, dan En. Sihat telah menyatakan bahawa jawapan tersebut daripada gambar. Adakah itu En. Sihat pada masa slope itu gagal, pernah tengok slope itu?

J: Saya pernah tengok, tapi saya tak ingat lagi masa bila.

S: Tak ingat lagi?

J: Ya, tak, 9 tahun lepas, tak ingat lagi, 6 tahun.

S: Tapi ada ingat pernah tengok?

J: Ya, saya tengok, saya ada tengok.

S: Ada tengok?

J: Ya, Yang Arif.

(g) finally, under re-examination, DW5 testified at pp 601–602 of the appellant's core bundle, Vol 2 of 2 as follows:

S: En. Sihat, ini telah ditujukan/beberapa surat-surat telah ditujukan kepada En. Sihat di mana En. Sihat telah memberi notifikasi kepada pihak defendan pertama untuk membaiki atau memberi pekerja atau membaiki kerja. Setiap kali surat-surat sebegini dikeluarkan, adakah En. Sihat membuat follow-up dan menyemak sama ada kerja-kerja tersebut dibaikikan atau arahan ini diikuti?

J: Ya, saya akan susul balik surat/kerja-kerja yang dibuat - mana-mana kerja yang dibuat berperingkat-peringkatlah.

S: En. Sihat, selepas penyerahan site balik kepada pihak plaintif dan isu-isu defect telah dibangkitkan, adakah En. Sihat puas bahawa semua defect-defect telah diperbaiki atau telah disusuli semula?

J : Saya tak puas juga kerana kadang-kadang masa kita nak repair ada bangunan dah masuk buat kerja. Jadi kita tak buat repair, tak boleh buat ada setengah tempat.

S: Ada defect-defect yang tidak boleh diperbaiki?

J: Diperbaiki, ya.

Judge Bukan tak boleh. Nampaknya macam tidak diperbaikilah kerana kerja lain sudah masuk.

J: Yalah dah ganggu dengan bangunan punya.

S: Secara keseluruhannya En. Sihat, adakah En. Sihat puas secara keseluruhannya bagi pihak tapak Fasa 3A dan 3B, adakah En. Sihat puas atas kemampatan yang dibuat dan apabila testing-testing dibuat?

J: Ya, saya puashati ikut pada laporan itulah - laporan dia ada.

(h) as demonstrated the former employee of the appellant, DW5, gave evidence in favour of the first respondent. He confirmed that he or his assistant would witness the soil testing and would in fact select the site for the soil density testing to take place. He further confirmed that the soil testing was done in his presence or that of his subordinate;

(i) the appellant was aware of the embankment failure two years before the first respondent made its counterclaim;

(j) and notwithstanding the embankment failure, the appellant further issued the certificate of making good defects at the end of the defects liability period;

(k) the appellant was aware of the outcome of the soil investigation report by its own expert in the person of Dr Mohd Asbi bin Othman ('PW4') well before entering into the settlement agreement with the first respondent. According to PW4, he had informed the plaintiff of his views

'straightaway'. The evidence of PW4 in cross-examination can be seen at Tab 18 of the first respondent's core bundle and it is ideal to reproduce them herein:

Q: When you say you informed the plaintiff verbally, straight away that you suspected that there would be widespread?

A: After the November.

Q: After the November report?

A: Yes.

Q: You informed them verbally?

A: Yes.

Q: Would that have been straightaway within the 2 or 3 days after you have been inspecting the site?

A: Verbally, yes.

Q: Who would you have told that to?

A: The Principal of Punchak Alam.

Q: Who's the Principal?

A: At that time it was Mr. Shaharudin.

Q: En. Shaharudin?

A: Ya.

Q: So they were aware that back then itself that there was a problem with the soil as to its …

A: That there was - I suspected that there was problem.

Q: And did you tell them also that you suspected that the soil density results were being misrepresented as far back as November?

A: After or before the test?

Q: After the test?

A: After the test definitely I told them because they need somebody like me to interpret the results and I showed them that based on preliminary investigation where the embankment failure was that there had been defective earthworks as far as the area near the embankment was concerned.

Q: Now, did you check the design of the slope?

A: I did to a certain extent, yes.

Q: That is not reflected in your report either?

A: No, it's not reflected.

Q: Did you check any, say for example, loading from the top level from the slope?

A: No.

Q: You didn't check that?

A: No, I did not. Well, I mean you see, the loading is only limited to a certain area within the embankment, but the settlement and the creep and the tacky cracks that we saw all at the embankment and more widespread even in areas where there's no logging.

Q: And you did not take any photographs of those?

A: We have photographs.

(l) and notwithstanding what PW4 had testified under cross-examination, the appellant agreed to enter into the settlement agreement;

(m) the expert report of the first respondent's witness by the name of Dr Gue See Sew ('DW3') concluded that the embankment failure was caused by soil erosion and poor drainage on the slope. In his expert report, DW3 had this to say (see Tab 26 of the first respondent's core bundle):

> After reviewing the Engineering Assessment Report of the Embankment Failure at Phase 3B of Bandar Puncak Alam, Selangor (EAR Report) prepared by Perunding ZNA of 5 March 2002, the findings can be summarised as follows:
>
> (1) The title of the EAR report does not tally well with the objective of the report which is mainly to assess the quality of earthwork in relation to the occurrence of embankment failure at Phase 3B. Investigation of slope failure should cover the following:
>
> (i) Design of slopes.
>
> (ii) Improper construction including compaction of fill.
>
> (iii) Loading or disturbance from adjacent construction activities.
>
> (iv) Lack of maintenance on drains and slope.
>
> (v) Erosion.
>
> (2) All in-situ density tests were carried out on the embankment that has a localised slip or failure. This area represent 21/2% of the overall filled area of Phase 3B (See Appendix 1). Most of the in-situ density tests were conducted on the embankment slope which is also outside the boundary of the development as shown in Appendix 2. Based on in-situ density tests done solely in this area, the EAR report further concludes that the fill on the whole site of Phase 3B is defective. (It) is imprudent to generalise and conclude the whole site based on the test results at only one area. There is also no evidence to show the misrepresentation of the actual soil density value and compaction quality throughout the development area prepared by Contractor, Menta Construction Sdn Bhd.

(3) Low density of the fill could have been disturbed due to the water seepage as shown in Trial Pit Log TP2.

(4) The slope failure was due to erosion. Evidence of choked and silted drain would result in water overflowing the drain during heavy downpour and caused erosion and finally the failed slope.

(n) it must be borne in mind that the appellant raised for the first time the question of the sufficiency of the works only after the second payment under the settlement agreement became due.

[33] Both PW4 and DW3 are expert witnesses and an expert evidence is admissible under our Evidence Act 1950 because it is relevant and it has a high probative value in relation to the issues raised in the case. The duty of an expert witness, according to the case of *Davie v Magistrates of Edinburgh* 1953 SC 34, at p 40, is to assist the judge in this way:

> Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.

[34] But the ultimate decision is for the judge to decide and that all questions of relevance and weight are for the judge alone *(Re M and R (minors) (sexual abuse: expert evidence)* [1996] 4 All ER 239 at p 253 (CA)). In the context of the present appeal, the High Court rightly assessed the expert evidence and came to a correct decision.

[35] The appellant heavily relied on the first engineering assessment report ('the first EAR report') that was prepared by Perunding ZNR in an attempt to rescind the settlement agreement. It is our judgment that the first EAR report is unsafe and cannot be relied upon to establish fraud for the following reasons:

(a) that the soil investigation report which forms the basis of the first EAR report was localised to the embankment failure on Phase 3B. This means that the testing that was carried out for the purpose of preparing this report was carried out in and around the area where the embankment failed. This fact is very important and cannot be overlooked for four main reasons:

(i) that the area where the embankment failed is located outside the boundary of the property belonging to the appellant;

(ii) that the area where the embankment failed represents only 2.5% of the overall fill area of Phase 3B and, calculation wise, if the total fill area for Phase 3A is taken into account, that figure will be significantly smaller;

(iii) that the appellant's expert failed to take into account the damaging effect of construction and piling works near the embankment as contributing to the embankment failure in Phase 3B; and

(iv) that the appellant's expert did not take into account the design of the slope and the poor maintenance of the drainage near the slope as well as the erosion;

(b) Ng Wai Yoong/Daniel Ng ('PW1') who carried out the soil investigation report on which the first EAR report was based admitted that the soil investigation that was conducted by him was not representative of the entire Phase 3B (see the cross-examination of PW1 as seen at Tab 17 of the first respondent's core bundle); and

(c) The first EAR report relied on another soil investigation report and this other report was not produced at the trial.

[36] A second engineering assessment report ('the second EAR report') was also relied upon by the appellant. The second EAR report was commissioned in February 2002 which was after the refusal to pay the second instalment of the settlement agreement. It was submitted by learned counsel for the first respondent that the second EAR report was designed to bolster the appellant's claim of fraud. It is our judgment that the second EAR report cannot be used to complain about the soil testing that was undertaken at the project bearing in mind that the second EAR report was also not representative of the entire scope of works because the full half of the trial pits that was used as a basis to form the conclusion in the second EAR report was carried out on those areas designated as 'kawasan lapang'. The evidence also showed that the first respondent was entitled to use materials such as palm oil tree trunks and boulders, that were otherwise unsuitable, for backfill on the 'kawasan lapang'. Under cross-examination, Wan Husin bin Wan Embong ('PW5') testified as to the use of boulders in this way (see p 480 of the first respondent's core bundle):

Q: Now, so far as the boulders are concerned there was a general instruction that boulders could be used on vacant sites and roads - under vacant sites and roads. Is that right?

A: Vacant sites and roads.

Q: For Phase 3A and 3B?

A : Yes.

Q: You recall this?

A: That one was discussed, ya.

Q: It was discussed?

A: It was discussed on this issue.

Q: This is for both Phases because I think you only referred to documents relating to 3A, but I want to know that it is for both? A

A: Ya, he is in charge of both Phases, ya.

[37] In regard to the usage of palm oil tree trunks, PW5 testified under cross-examination in this way (see p 482 of the first respondent's core bundle): B

Q: Now, with regard to this chipping, did you ever describe what you wanted or what you meant by chipping in your instructions of the palm trunks?

A: The understanding was the tree trunk has to be cut into small pieces - yes. C

Q: But no discussion took place and how small that they had to be?

A: I have to check on that. I can't remember whether there is or not. But definitely it has to be cut off.

Q: They have to be cut but D

A: They have to be cut into small pieces.

Q: Cut into pieces about 20 cm or so – 40 cm?

A: The intention would be cut into small pieces – I have to check whether I can't remember whether we discussed on the sizes or not. But they have to be in small enough sizes so that we have no void between. E

Q: That would be no void between?

A: No void between. F

[38] And the dumping of oil palm trunks at the 'kawasan lapang' was further emphasised by PW5 at pp 484–485 of the first respondent's core bundle:

Q: Can you look at under 30th April and 1st–29th or 30th April the site clearing and dumping of oil palm trunks at kawasan lapang. So it was reported? It was brought to the attention of En. Badrul and was approved by the clerk (of) works at the bottom? Is that correct? G

A: Yes, yes.

Q: Can I take you now to 1224/1223 rather, the same Bundle. Again this is yet another weekly report and that also brings it to the attention of - so it was brought to the attention of En. Badrul then? They were dumping oil palm trunks at the KL3 phase. You look at 20/5/1999. KL3 of course kawasan lapang, is it not, KL is abbreviation for kawasan lapang. Is that right? H I

A: Ya.

[39] Based on these salient facts, the High Court was entitled to come to the

conclusion that the expert reports provided by the appellant were fraught with fanciful speculation and were insufficiently substantiated.

[40] We must reiterate that the courts must be slow and cautious in deciding whether to interfere with settlement agreements entered by the parties. Since time immemorial, the principle has always been that there must be a finality to disputes between the parties. The following facts must be put to the forefront:

(a) that the appellant was represented at the negotiations for settlement by its executive director who was also a qualified lawyer;

(b) that despite being put on notice in regard to the embankment failure and the alleged defective works, the appellant nevertheless entered into the settlement agreement; and

(c) flowing from all these, the appellant paid out its first instalment under the settlement agreement.

[41] It is part and parcel of our judgment that the appellant's claim was cleverly designed to merely raise the spectre of fraud in order to avoid its obligations under the settlement agreement. An illusion of fraud cannot fulfil the standard of proof as required by the law. Here, the appellant failed to prove fraud beyond reasonable doubt.

[42] It is germane to mention that the appellant in its memorandum of appeal only raised matters, facts and evidence against the first respondent. And evidence was also led by the parties confined mainly to the involvement of the first respondent. Even the submission advanced by the appellant centred on the first respondent and it did not implicate the second respondent in any way.

[43] Furthermore, all the interim payments were made between the appellant and the first respondent. It is apparent that the appellant and the first respondent had excluded the second respondent in all negotiations leading to the execution of the settlement agreement. And all the discussions, meetings and negotiations during and after the construction works were concluded between the appellant and the first respondent only. Even Tan Choon Hock ('DW1') in his evidence under cross-examination testified that the second respondent was not involved in Phase 3A and did not do any work for Phase 3B.

[44] The role of the second respondent in this project was merely as a main contractor 'on paper' only. It was the appellant who had instructed the second respondent to appoint the first respondent as the nominated subcontractor for Phase 3B. And that all matters during the construction were dealt with by the appellant and the first respondent to the exclusion of the second respondent.

With this kind of arrangement between the appellant and the first respondent, the contract that was initially awarded to the second respondent as the main contractor had been novated. And there existed a new, separate and binding contract between the appellant and the first respondent to the exclusion of the second respondent.

[45] It is appropriate to state that the novation was not objected to by any party including the second respondent. The subsequent conduct of the appellant and the first respondent further showed that they had entered into the settlement agreement. There are no two ways about it.

[46] By virtue of s 63 of the Contracts Act 1950, the second respondent had been discharged from any contractual obligation under the original appointment. In its original text, s 63 of the Contracts Act 1950 enacts as follows:

> 63 Effect of novation, rescission and alteration of contract.
>
> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

[47] Salleh Abas LP in *Lyl Hooker Sdn Bhd v Tevanaigam Savisthri & Anor* [1987] 2 MLJ 52, at p 53 aptly described 'novation' in these erudite terms:

> Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which is already extinguished (see *Chitty on Contract*, Vol 1, (1983 Ed), at paras 1315–1316).

[48] Gunn Chit Tuan J (as he then was) in *Malaysian International Merchant Bankers Bhd v Datuk Mohd Salleh & Anor* [1988] 1 CLJ (Rep) 786, at p 792 explained the meaning of 'novation' in this way:

> Novation, no doubt, is an act whereby, with the consent of all parties, a new contract is substituted for an existing contract and the latter is discharged. Usually, but not necessarily, a novation takes the form of the introduction of a new party to the new contract and the discharge of a person who was party to the old contract.

[49] Low Hop Bing J (later JCA) in *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1996] MLJU 359; [1997] 1 CLJ Supp 448, at p 454 had this to say about 'novation':

Pollock & Mulla in *Indian Contract and Specific Relief Acts* (10th Ed), p 501 sets out the requirements that must be satisfied before a party can successfully show that a contract has been varied pursuant to s 63, viz:

(a) firstly, the variation of the contract may be shown by express agreement; and

(b) secondly, if variation is to come about by a course of conduct, the variation was intended and understood by both parties.

The burden is on the plaintiff to establish that the above requirements are fulfilled in order to bring about the operation of the principles of novation.

[50] Abdul Malik bin Ishak J (now JCA) in *Mawar Awal (M) Sdn Bhd v Kepong Management Sdn Bhd & Anor* [2005] 6 MLJ 132, at p 150 made reference to 'novation' in this way:

(38) It is ideal to mention that s 63 of the Contracts Act 1950 on novation is of wider import. Indeed this was the view held by Visu Sinnadurai J in *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127; [1994] 3 CLJ 806; [1994] 3 AMR 2060 and I certainly share his view. His Lordship Visu Sinnadurai J in that case aptly said:

> Section 63 is not limited in its scope to novation as it is understood under English Law alone, but also covers situations where the parties have rescinded the earlier contract, by substituting a new one. If there is an intention on the part of both the parties to substitute a new contract, the old need not be performed, even if the new merely alters certain terms of the old. The test basically is this: if a new contract is entered into by the parties, whatever its terms, the old contract is extinguished. It does not, however, cover a situation where the terms of the old contract are merely altered or varied, without a new contract in substitution of it being entered into. In such a case, the old contract, as altered or varied, remains in force.

[51] *Halsbury's Laws of England*, Vol 8, (3rd Ed), defined 'novation' in this way:

> Novation is, in effect, a form of assignment in which, by the consent of all parties, a new contract is substituted for an existing contract. Usually, but not necessarily, a new person becomes party to the new contract, and some person who was party to the old contract is discharged from further liability. The introduction of a new party prevents the new contract from being a mere accord without satisfaction, and thus affords a defence to any action upon the old contract.
>
> For novation to ensue there must be not only the substitution of some other obligation for the original one, but also the intention or *animus novandi*.

[52] Next, it was argued that the appellant's claim was barred by estoppel and acquiescence. It is trite law that when one party conducts himself in such a

fashion as to lead the other party to believe that he has been given a unilateral waiver of performance of a particular part of the contract, then the party who is relying on that conduct is entitled to claim such a waiver. Lord Denning MR in *W J Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 (CA), writing a separate judgment had this to say about 'waiver' at p 140 of the report:

> The principle of waiver is simply this: if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa Per Azioni v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527 at p 539 per Denning LJ.

[53] Earlier on, in the case of *Charles Rickards LD v Oppenhaim* [1950] 1 KB 616 (CA), Denning LJ writing a separate judgment at p 623 clarified the terminology that was to be adopted in describing 'waiver' in these words (see p 623):

> Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel.

[54] Thus, the word 'waiver' is often referred to as an 'estoppel'. In the words of Bowen LJ in *Low v Bouverie* (1891) 3 Ch 82, at p 105:

> Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.

[55] Here, factually speaking, the appellant took the following steps through the supervising officer which constituted estoppel in every sense of the word:

(a) having issued and paid out on the interim certificates for work done;

(b) having issued the certificate of practical completion;

(c) having issued the certificate of making good defects; and

(d) having issued the statement of final account.

[56] In addition to the above, the appellant had taken the following steps in order to ensure that the work was sufficiently carried out to its satisfaction:

(a) that DW5 was empowered to and did in fact carry out compaction testing during the course of the works;

(b) that DW5 monitored and witnessed the compaction testing that was carried out on the site while the progress of the works was ongoing;

(c) when DW5 was dissatisfied with the nature of the works, he would direct rectification and further testing;

(d) the first respondent provided the progress reports of the works that were carried out and discussions with the appellant's representatives at site meetings were held at regular intervals; and

(e) after the certificate of making good defects was issued to the first respondent, no further complaints were raised regarding the sufficiency of work and the quality of materials until after the second payment was due under the settlement agreement.

[57] All the facts adumbrated above coupled with the settlement agreement and the subsequent payment of the first instalment can only lead to only one conclusion: that the appellant must be estopped from claiming that there were defective works under the original agreement.

CONCLUSION

[58] We have perused through the evidence with a fine toothcomb and we have also mulled through the evidence at great length. The facts as narrated revealed that the first respondent had carried out its works under the contracts. And the first respondent even carried out the testing of the works under the watchful eye of the appellant's representatives. The works were accepted by the appellant through two methods: testing and certification process. The appellant even issued its final certificate for payment and the certificate of making good defects. But the first respondent was not paid the balance sums due to it under the certificates. And when the first respondent threatened to wind up the appellant for non-payment, the appellant quickly entered into the settlement agreement. The appellant proceeded to partly perform its obligations to pay under the settlement agreement. And when the time came to pay the second instalment under the settlement agreement, the appellant alleged fraud and conspiracy and refused to pay.

[59] In our judgment, the allegations of fraud and conspiracy were based on the facts known to the appellant prior to entering the settlement agreement. It cannot be denied that the first respondent had carried out substantial works for the benefit of the appellant and the first respondent had been kept out of the funds since 2002. The appellant had benefitted and enjoyed the fruits of the first respondent's labour.

[60] In so far as the second respondent is concerned, there was no evidence to pin liability on the second respondent. It is a dispute between the appellant

and the first respondent and the second respondent secured RM700,000 for allowing the first respondent to play a major role in this case. Even the settlement agreement concerned the appellant and the first respondent to the exclusion of the second respondent.

[61] For these varied reasons, we dismissed the appeal of the appellant with costs of RM50,000 in favour of the first respondent and RM10,000 in favour of the second respondent. We affirmed the decision of the High Court. Deposit to be refunded to the appellant.

Appellant's appeal dismissed with costs.

Reported by Kanesh Sundrum